

**CLE: Adjudication of Capital Cases in Delaware**  
**Friday, April 11, 2008**

**Client Objective v. Lawyer Strategy**

Moderator: The Honorable Jan R. Jurden  
Superior Court of the State of Delaware

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## THE DELAWARE LAWYERS' RULES OF PROFESSIONAL CONDUCT

(Effective July 1, 2003 and current through most recent amendment on Jan. 7, 2008)

### Rule 1.2. Scope of representation

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

### COMMENT

*Allocation of authority between client and lawyer.* -- [1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by

**the lawyer.** The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. **If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).**

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

[5] *Independence from client's views or activities.* -- Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

[6] *Agreements limiting scope of representation.* -- The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

[9] *Criminal, fraudulent and prohibited transactions.* -- Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

***Red Dog v. State*, 625 A.2d 245 (Del. 1993)**

In 1993, James Allen Red Dog was convicted of capital murder and faced execution. Red Dog wished to forgo all appeals and accept the death penalty, however, against his express instructions his defense attorneys moved for a stay of his execution. The Superior Court denied the stay of execution and on appeal the Supreme Court affirmed. During this litigation, the positions of the individual public defenders was inconsistent concerning the issue of Red Dog's competency to forgo appeals, therefore, the Court held "that the public defenders had no standing to file...a motion to stay his execution in derogation of his express directions to the contrary." *Red Dog v. State*, 620 A.2d 848, 853 (Del. 1993). The Supreme Court then directed Rules to Show Cause to the Public Defender of the State of Delaware and four different assistant public defenders directing them to explain why sanctions should not be imposed regarding their representation of Red Dog.

Each of the Respondents defended their actions by citing the *Rules of Professional Conduct* and the exigencies of representation of a client facing execution. The Supreme Court appointed *amicus curiae* to present arguments on the ethical implications of the Respondents' conduct. The Delaware State Bar Association, the Delaware Trial Lawyers Association, and the Delaware Chapter of the American Civil Liberties Union also filed briefs in support of the Respondents' actions. The Respondents' filed written responses to the court-appointed *amicus curiae* and oral argument ensued.

The Court concluded that a condemned's wish to forego appeals and accept the death penalty is a decision that an attorney must respect, and the decision is not an irrational act. But the Court recognized that none of the Respondents acted in bad faith and, therefore, found no basis for imposition of sanctions.

***People v. Henriquez*, 818 N.E.2d 1125 (N.Y. 2004)**

In March 1994, Michael Henriquez was arrested for and charged with intentional murder and endangering the welfare of a child for the fatal shooting his girlfriend in the presence of their infant daughter. Defense counsel secured the suppression of Henriquez's confession. During jury selection, defense counsel questioned prospective jurors, but the defendant decided not to be present for this proceeding.

Before opening statements, the defense attorney informed the trial judge that Henriquez had instructed him to not participate in the

proceedings and to just sit and listen. The defendant had directed him to "not cross-examine any witnesses, not to object to any line of questioning, not to approach the bench, not to participate in any bench conferences or side bars, not to have any defense in the case, not to call any witnesses, not to sum up, not to do anything. Just wanted him to sit there and do nothing." The attorney moved to be relieved of his assignment and requested that Henriquez continue *pro se*. Henriquez stated that he did not want to represent himself.

The trial judge questioned the defendant as to whether he was aware of his jury trial rights and the role of defense counsel. Henriquez acknowledged that he had consulted with his attorney about possible defenses and understood that his counsel would present them to the jury on his behalf. Henriquez further understood that his counsel would be unable to do so if the attorney was prevented by him from participating in the proceeding. The trial court tried to dissuade the defendant from waiving these important jury trial rights but Henriquez persisted. The court denied the defense attorney's motion to withdraw as counsel and ordered counsel to remain available during the proceedings in the event that Henriquez changed his mind.

Henriquez was adamant in not allowing his counsel to participate throughout the entire proceedings. The jury found him guilty of intentional murder and of the other crimes charged. An intermediate appellate court affirmed Henriquez's conviction finding that he was consistently warned about waiving his rights but did so knowingly.

In the Court of Appeals of New York, Henriquez argued that his constitutional right to a fair trial was violated. He claimed that he did not waive his Sixth Amendment right to the effective assistance of counsel, therefore his counsel was "ethically obligated to mount a defense and the trial court, by allowing counsel to remain mute, failed to insure that [his] guilt be determined only after an adversarial proceeding."

Citing several cases in which criminal defendants had refused the right to self-representation and also restricted their attorney's participation, the Court of Appeals concluded the defendant had voluntarily waived the right to effective assistance of counsel. Affirming the murder conviction, the Court wrote that Henriquez must accept that he knowingly, voluntarily, and intelligently waived his right to effective assistance with a full understanding of the consequences of his actions.

***Florida v. Nixon*, 543 U.S. 175 (2004)**

Joe Elton Nixon was convicted of first-degree murder, kidnapping, robbery, and arson, and a death sentence was imposed. After his arrest for this particularly brutal murder, Nixon confessed to the police that he committed the murder and gave details as to how he had kidnapped and killed the victim. His assigned public defender initially filed a plea of not guilty. After finding that the evidence gathered by the State was overwhelming, the attorney decided to engage a strategy he felt would spare his client's life by conceding his guilt and focusing on the mitigation evidence of the penalty phase. The plan was to preserve Nixon's credibility for the death penalty phase so the jury would consider a mental health issue and spare him from the death penalty. The attorney later testified in post-conviction that he offered the strategy to Nixon several times, but his client remained unresponsive. The attorney interpreted Nixon's unresponsiveness as neither an approval nor a protest of this tactic and therefore moved forward with his planned defense strategy.

During trial, Nixon engaged in disruptive behavior and was absent for a majority of the proceedings. From opening statement through closing arguments of the guilty phase, the attorney acknowledged Nixon's guilt and urged the jury to focus on the potential penalty. The jury convicted Nixon of all the charges and even after the attorney's full press during the penalty phase recommended death. The Florida Supreme Court affirmed the conviction on direct appeal.

On post-conviction, however, the Florida Supreme Court reversed the conviction concluding that the attorney's concession that Nixon committed the murder without his client's express consent constituted prejudicial ineffective assistance of counsel. The Court noted that the public defender's concession was the equivalent of a guilty plea and an abandonment of the adversarial nature of the proceeding. While the court recognized the strategy was in the best interest of his client, if found that the lawyer could not engage this strategy without the express consent of his client. The United States Supreme Court granted certiorari.

The United States Supreme Court held that the attorney's concession of guilt was not "the functional equivalent of a guilty plea." The Court ultimately concluded that because Nixon had been unresponsive during the several occasions that his attorney informed him of his strategy and as this strategy was in his best interest, the public defender's decision to concede guilt did not constitute ineffective assistance of counsel. The decision of the Florida Supreme Court was reversed. The Court noted there are times when the only realistic

strategy for an attorney in this difficult position is to seek mercy so as to avoid execution. The Court held that trying to spare Nixon's life by focusing on the death penalty phase – even while conceding guilt – could not be deemed ineffective assistance of counsel.

***Steward v. Grace*, 2007 WL 2571448 (E.D. Pa. 2007)**

In 1986, David Steward was convicted of first degree murder and other charges. The murder involved the shooting of a man as he lay in bed next to his wife after having been awoken by Steward who was then burglarizing his home. There was overwhelming evidence of Steward's guilt including eyewitness identification by the victim's wife, physical evidence and Steward's own confession.

During his trial, the Commonwealth introduced this mass of incriminating evidence, but Steward insisted that his attorney argue factual innocence (i.e. he was not the perpetrator of the crime.) The defense attorney, having vigorously defended Steward during the trial, realized that the Commonwealth's case was simply insurmountable and during closing argument spontaneously changed his trial strategy and asked the jury to find Steward guilty of murder in the second degree. He did so in order to avoid a murder first conviction or to at least enhance his credibility with the jury so he could more effectively persuade the jury to show leniency during the sentencing phase. In sum, the attorney chose this strategy to spare the life of his client who was facing execution with the argument that his client "did a dumb thing" under the influence of drugs. Defense counsel had never consulted with nor mentioned to Steward a change in his strategy and therefore never obtained express consent for this decision.

During state post-conviction and federal habeas proceedings, Steward argued ineffective assistance of counsel. The federal habeas court concluded that although the trial attorney did not obtain consent to concede Steward's guilt during closing argument it was not ineffective or unreasonable. The Court did note, however, that the defense attorney's actions "undermined the sanctity of the attorney-client relationship" and "flouted the axiomatic principle that the accused has the power to direct his own defense, while the attorney has the power to choose the means to achieve those ends. By conflating the roles of client and advocate, [counsel] took the unwarranted risk that the trial might not reliably reach a just outcome." While counsel was successful in meeting his ultimate goal the Court termed his actions as "improper" and "such attorney conduct [wa]s strongly condemned."



***Davenport v. Diguglielmo*, 2007 WL 412422 (3d Cir. 2007)**

Elmer Davenport was convicted in the Commonwealth of Pennsylvania for second degree murder, rape and theft and is now serving a life sentence. After a night of drinking and smoking crack, Davenport raped and strangled a woman he had first met at a Philadelphia bar earlier that same evening. He confessed both to his girlfriend and to the police that he had intentionally choked the victim to death. He was arrested for murder, rape and related charges. The record is inconclusive as to whether the case was death-penalty certified or not.

Davenport insisted on pleading not guilty even in the face of the unassailable evidence incriminating him. Davenport wanted to use self-defense; however, his defense counsel advised him that he did not believe such a claim would be successful. Unconvinced, Davenport testified at trial and claimed for the first time that he acted in self-defense because the victim supposedly stabbed him before he started to strangle her. In light of the evidence presented and after informing his client of his intent, Davenport's defense counsel pursued a strategy designed to lessen the degree of murder to third degree by arguing diminished capacity. During closing, the attorney stated, "there is no doubt you have a murder here" and went on to assert a third degree murder diminished capacity defense. The trial judge found Davenport guilty of second degree murder, rape and theft.

In state post-conviction and federal habeas proceedings, Davenport contended his attorney was ineffective because he had not consented to a diminished capacity defense, which required a concession of guilt. The Third Circuit concluded that Davenport had given consent to counsel to use the diminished capacity defense. But, the Court further held that even if Davenport had not explicitly consented to trial counsel's pursuit of the diminished capacity defense or the concession of guilt during his closing argument, defense counsel's performance was not deficient. The Court concluded that the defense attorney's pursuit of a diminished capacity defense was effective trial strategy.